Supreme Court of Nevada

Maryann C. SHELTON, n/k/a Maryann C. Mitchell, Appellant,
v.
Roland A. SHELTON, Respondent.

No. 37483.

Oct. 29, 2003.

Before AGOSTI, C.J., SHEARING and BECKER, JJ.

OPINION

SHEARING, J.

The principal issue in this appeal is whether relief is available to a former spouse when a veteran unilaterally waives his military pension in order to receive disability benefits, resulting in the former spouse's loss of her community share in the pension. We conclude that, although courts are prohibited by federal law from determining veterans' disability pay to be community property, state law of contracts is not preempted by federal law. Thus, respondent must satisfy his contractual obligations to his former spouse, and the district court erred in denying former spouse's motion solely on the basis that federal law does not permit disability pay to be divided as community property.

FACTS

Respondent Roland Shelton and appellant Maryann Shelton were married on September 6, 1980, in San Diego, California. Roland served in the United States Navy for more than ten years during the marriage. On January 17, 1997, the Sheltons jointly petitioned for a summary decree of divorce in Clark County District Court. On January 29, 1997, the district court entered a decree of divorce incorporating the parties' joint petition.

Under the terms of the agreement, the parties designated both Roland's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay to Roland. The parties, who negotiated the terms without the aid of counsel, agreed that Roland, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." Maryann would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise."[1] At the time of the divorce, Roland had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled. Both Roland and Maryann waived any right to spousal support; however, Maryann remained as beneficiary under Roland's military retirement insurance.

Beginning in January 1997, Roland regularly made his required payments to Maryann. In 1999, the Department of

[1] Despite the purported equal division, the numerical disparity between the respective portions of military retirement pay was never addressed.

Veterans Affairs reevaluated Roland's disability status and concluded that Roland was 100 percent disabled, effective May 1, 1998. Roland elected to waive all his military retirement benefits for an equivalent amount of tax-exempt disability pay as federal law allows.[2] Upon receiving notice of an increased disability rating on February 26, 1999, Roland ceased his payments to Maryann.

Thereafter, Maryann moved the district court for an order enforcing the decree of divorce. Maryann asked for half of Roland's military pension, or $577, as had been agreed upon before the divorce and as was incorporated in the divorce decree. Roland opposed Maryann's motion on the grounds that the divorce decree did not allocate disability pay to Maryann, and that federal law prohibited community property division of veterans' disability benefits. The district court denied Maryann's motion on the basis of the United States Supreme Court's decision in *Mansell v. Mansell* (*Mansell I*),[3] despite repeatedly stating how unfair the result was to Maryann. In *Mansell I,* the Supreme Court held that federal law prevents states from treating military disability pay as divisible community property.[4] The district court also refused to grant Maryann equitable relief for the loss of her $577 monthly income on the basis that it lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree.

[2] 38 U.S.C. § 5305 (2000).

[3] 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989).

[4] *Id.* at 594-95, 109 S.Ct. 2023.

DISCUSSION

Domestic relations are generally within the purview of state courts.[5] However, in *McCarty v. McCarty,* a 1981 decision, the United States Supreme Court construed federal statutes to prevent state courts from treating military retirement pay as community property.[6] The United States Supreme Court reasoned that federal preemption was necessary as the federal government was interested in maintaining military retirement schemes as an inducement for enlistment and reenlistment and for effective military personnel management.[7] In response to the broad preemption ruling in *McCarty,* Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982.[8] The USFSPA authorizes state courts to divide "disposable retired pay" among spouses in accordance with community property law.[9] Although the USFSPA clearly

[5] *Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581, 99 S.Ct. 802, 59 L.Ed.2d 1 (1979).

[6] 453 U.S. 210, 232-35, 101 S.Ct. 2728, 69 L.Ed.2d 589 (1981); *see also Mansell I,* 490 U.S. at 584, 109 S.Ct. 2023 (discussing *McCarty*).

[7] *McCarty,* 453 U.S. at 213, 234, 101 S.Ct. 2728.

[8] Pub.L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408). The parties refer to the 1982 version of the statute; however, the relevant parts of the statute have not changed since 1982.

[9] 10 U.S.C. § 1408(c)(1) (2000). Disposable retired pay refers to monthly retired pay minus statutory exceptions. *Id.* §

(continued...)

subjected military retirement pay to community property laws, it did not clearly address whether disability benefits were also subject to state community property or equitable distribution laws.

Subsequently, in *Mansell I,* the Supreme Court considered whether state courts may treat veterans' disability benefits as community property. The Court initially noted that "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay."[10] The Court then held that under USFSPA's "plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay [which includes disability pay] as community property."[11] Because Roland elected to receive full disability pay in lieu of his retirement pay, he argues that *Mansell I* prevents any payments to Maryann, thus depriving her of her community property interest in Roland's pension. Based on the cases decided after *Mansell I,* we do not agree.

Many courts have determined that a recipient of military disability payments may not deprive a former spouse of marital

[9](...continued)
1408(a)(4).

[10] *Mansell I,* 490 U.S. at 583, 109 S.Ct. 2023; *see also* 38 U.S.C. § 5305 (2000) (previously codified at 38 U.S.C. § 3105 (1988)).

[11] 490 U.S. at 589, 109 S.Ct. 2023.

property.[12] The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay.[13] Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata[14] or from enforcing contracts[15] or from reconsidering divorce decrees,[16] even when disability pay is involved.

In *Poullard v. Poullard,* the Louisiana Court of Appeal held that the husband had stipulated to give his former wife one

[12] *In re Marriage of Mansell,* 217 Cal.App.3d 219, 265 Cal.Rptr. 227 (Ct.App.1989) (*Mansell II*), *cert. denied,* 498 U.S. 806, 111 S.Ct. 237, 112 L.Ed.2d 197 (1990); *Ford v. Ford,* 30 Ark.App. 147, 783 S.W.2d 879 (1990); *McHugh v. McHugh,* 124 Idaho 543, 861 P.2d 113 (1993); *Adams v. Adams,* 725 A.2d 824 (Pa.1999); *Trahan v. Trahan,* 894 S.W.2d 113 (Tex.App.1995); *Owen v. Owen,* 14 Va.App. 623, 419 S.E.2d 267 (1992); *In re Marriage of Jennings,* 138 Wash.2d 612, 980 P.2d 1248 (1999).

[13] Virtually any military retiree eligible for disability will elect to receive disability pay rather than retirement pay since disability pay is not subject to federal, state and local taxation, and thus increases the recipient's after-tax income. 38 U.S.C. § 5301(a) (2000) (previously codified at 38 U.S.C. § 3101(a) (1988)); *Mansell I,* 490 U.S. at 583-84, 109 S.Ct. 2023.

[14] *Mansell II,* 265 Cal.Rptr. at 227; *Ford,* 783 S.W.2d at 879; *Trahan,* 894 S.W.2d at 113.

[15] *Adams,* 725 A.2d at 824; *McHugh,* 861 P.2d at 113; *Owen,* 419 S.E.2d at 267.

[16] *Marriage of Jennings,* 980 P.2d at 1248.

half of his retirement pay in consideration of her alimony waiver.[17] The court held that "[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another.... [T]he redesignation of pay cannot defeat the prior agreement of the parties."[18]

In *Hisgen v. Hisgen,* the Supreme Court of South Dakota enforced a property settlement agreement, stating:

> That case [*Mansell I*], however, does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to half a veteran's retirement entitlement. "[T]he source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets."[19]

The question of the interpretation of a contract when the facts are not in dispute is a question of law.[20] "A contract is ambiguous if it is reasonably susceptible to more than one interpretation."[21] The best approach for interpreting an

[17] 780 So.2d 498, 499-500 (La.Ct.App.2001).

[18] *Id.* at 500 (internal quotation marks omitted).

[19] 554 N.W.2d 494, 498 (S.D.1996) (quoting *Holmes v. Holmes,* 7 Va.App. 472, 375 S.E.2d 387, 395 (1988)).

[20] *Grand Hotel Gift Shop v. Granite St. Ins.,* 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

[21] *Margrave v. Dermody Properties,* 110 Nev. 824, 827, 878

(continued...)

ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties."[22] This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties.[23] Also, a specific provision will qualify the meaning of a general provision.[24] Finally, "[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[25]

The property settlement agreement between Roland and Maryann is ambiguous. The agreement states that Roland's military disability is community property, but it awards the entire amount to Roland. The award of military retirement pay to Maryann describes the award as "[o]ne half of HUSBAND'S military retirement in the amount of $577, until her demise," but the amount designated is more than one-half the amount of Roland's retirement pay at the time. Roland paid Maryann $577

[21](...continued)
P.2d 291, 293 (1994); *see also Pressler v. City of Reno,* 118 Nev. ----, ----, 50 P.3d 1096, 1098 (2002).

[22] *Hilton Hotels v. Butch Lewis Productions,* 107 Nev. 226, 231, 808 P.2d 919, 921 (1991).

[23] *See Trans Western Leasing v. Corrao Constr. Co.,* 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982).

[24] *See Mayer v. Pierce County Medical Bureau,* 80 Wash.App. 416, 909 P.2d 1323, 1327 (1995).

[25] *Dickenson v. State, Dep't of Wildlife,* 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

until the time he elected to take disability pay in lieu of retirement pay.

It appears, therefore, that the agreement of the parties was that Roland pay Maryann $577 each month for her portion of the community asset, rather than pay her one-half of his retirement pay, since $577 is more specific than "one-half." Moreover, the parties' subsequent conduct reinforces this conclusion, in that Roland ratified the terms of the agreement by performing his obligations under the decree for a period of two years.[26] In addition, this interpretation yields a fair and reasonable result, as opposed to a harsh and unfair result. Roland cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay.[27] It appears that Roland possesses ample other assets from which to pay his obligation without even touching his disability pay. Even if he lacks these assets, nothing prevents him from using his disability payments to satisfy his contractual obligation.[28]

[26] *Hoskins v. Skojec,* 265 A.D.2d 706, 696 N.Y.S.2d 303, 304 (1999).

[27] *Dexter v. Dexter,* 105 Md.App. 678, 661 A.2d 171, 174-75 (1995) (holding that under Maryland contract law, "the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily ... waiving ... the pension benefits"); *Johnson v. Johnson,* 37 S.W.3d 892, 897 (Tenn.2001) (holding that the spouse's "vested interest cannot thereafter be unilaterally diminished by an act of the military spouse," and that the trial court must enforce the decree to provide the spouse with guaranteed monthly payment).

[28] *Poullard,* 780 So.2d at 500 (holding that "[n]othing in either state or federal law prevents a person from agreeing to give part

(continued...)

CONCLUSION

Although states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved. The district court's order is reversed and this matter is remanded to the district court for further proceedings consistent with this opinion.

We concur: AGOSTI, C.J. and BECKER, J.

[28](...continued)
of his disability benefit to another").

FILED
Jan[uary] 31, 2001

DISTRICT COURT
Clark County, Nevada

In the Matter of the Joint Petition of
Roland A. Shelton and Maryann C. Shelton

Roland A. SHELTON, Plaintiff
v.
Maryann C. SHELTON, Defendant,

Case No.: D208942
Dept. No.: F

ORDER

The above-entitled action having come on for hearing on January 24, 2001, Plaintiff present and represented by Glenn Schepps, Esq., of the Leavitt Law Firm, Defendant present and represented by her attorneys, the Law Offices of Amesbury and Schutt, the Court having reviewed all papers and pleadings on file, having heard and considered argument of counsel, and otherwise being fully advised in the premises finds as follows:

IT IS HEREBY ORDERED that Defendant's Motion for Order to Show Cause Why Plaintiff Should Not be Held in Contempt is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Enforce Decree of Divorce is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion to Reduce Arrears to Judgment is hereby denied.

IT IS FURTHER ORDERED that Defendant's Motion for Attorney's Fees and Costs is hereby denied.

IT IS FURTHER ORDERED that Plaintiff's Countermotion for Attorney's Fees is hereby denied.

IT IS FURTHER ORDERED that pursuant to federal law, Defendant is not entitled to any portion of Plaintiff's veteran's disability as such is not considered a community asset divisible by this Court.

IT IS FURTHER ORDERED that Defendant's request for alimony is hereby denied due to the fact that this Court does not have jurisdiction over that issue.

ENTERED this 30[th] day of January, 2001.

Robert E. Gaston

District Court Judge

FILED
Jan[uary] 29, 1997

DISTRICT COURT
Family Division
Clark County, Nevada

In the Matter of the Joint Petition of
Roland A. Shelton and Maryann C. Shelton,
Co-Petitioners

Case No.: D208942
Dept. No.: B

DECREE OF DIVORCE

This cause coming on without hearing, the Petitioners not appearing, but having filed their Joint Petition for Summary Divorce, the Court having before it all the files, pleadings and papers in the action, and being fully advised in the premises, and fully satisfied that the action has been duly and regularly commenced finds:

* * * *

That the Petitioners have certain community property and have agreed to divide it as follows:

A. To Co-Petitioner ROLAND A. SHELTON:

* * * *

14. One half of military retirement pay in the amount of $500 and military disability pay in the amount of $174.

B. To Co-Petitioner MARYANN C. SHELTON:

* * * *

10. One half of HUSBAND's military retirement in the amount of $577, until her demise.

* * * *

That both Petitioners waived any right to spousal support, but Co-Petitioner ROLAND A. SHELTON has agreed to leave Co-Petitioner, MARYANN C. SHELTON, as beneficiary on Military Retirement Insurance.

* * * *

DONE AND ORDERED, this 24th day of January, 1997.

/s/
District Judge

UNITED STATES CODE ANNOTATED
TITLE 10. ARMED FORCES
SUBTITLE A – GENERAL MILITARY LAW
PART II--PERSONNEL
CHAPTER 71--COMPUTATION OF RETIRED PAY

§ 1408. Payment of retired or retainer pay in compliance with court orders.

(a) Definitions.--In this section:

(1) The term "court" means--

(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdiction;

(C) any court of competent jurisdiction of a foreign country with which the United States has an agreement requiring the United States to honor any court order of such country; and

(D) any administrative or judicial tribunal of a State competent to enter orders for support or maintenance (including a State agency administering a program under a State plan approved under part D of title IV of the Social Security Act), and, for purposes of this subparagraph, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(2) The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act (42 U.S.C. 653(p)), which--

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for--

(i) payment of child support (as defined in section 459(i)(2) of the Social Security Act (42 U.S.C. 659(i)(2)));

(ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act (42 U.S.C. 659(i)(3))); or

(iii) division of property (including a division of community property); and

(C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

(3) The term "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided

under the laws applicable to such appeals.

(4) The term "disposable retired pay" means the total monthly retired pay to which a member is entitled less amounts which--

(A) are owed by that member to the United States for previous overpayments of retired pay and for recoupments required by law resulting from entitlement to retired pay;

(B) are deducted from the retired pay of such member as a result of forfeitures of retired pay ordered by a court-marital or as a result of a waiver of retired pay required by law in order to receive compensation under title 5 or title 38;

(C) in the case of a member entitled to retired pay under chapter 61 of this title, are equal to the amount of retired pay of the member under that chapter computed using the percentage of the member's disability on the date when the member was retired (or the date on which the member's name was placed on the temporary disability retired list); or

(D) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired pay is being made pursuant to a court order under this section.

(5) The term "member" includes a former member entitled to retired pay under section 12731 of this title.

(6) The term "spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, was married to that member.

(7) The term "retired pay" includes retainer pay.

* * * *

(c) Authority for court to treat retired pay as property of the member and spouse.--(1) Subject to the limitations of this section, a court may treat disposable retired pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court. A court may not treat retired pay as property in any proceeding to divide or partition any amount of retired pay of a member as the property of the member and the member's spouse or former spouse if a final decree of divorce, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) was issued before June 25, 1981, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse. Payments by the Secretary concerned under subsection (d) to a spouse or former spouse with respect to a division of retired pay as the property of a member and the member's spouse under this subsection may not be treated as amounts received as retired pay for service in the uniformed services.

(3) This section does not authorize any court to order a member to apply for retirement or retire at a particular time in order to effectuate any payment under this section.

(4) A court may not treat the disposable retired pay of a member in the manner described in paragraph (1) unless the court has jurisdiction over the member by reason of (A) his residence, other than because of military assignment, in the territorial jurisdiction of the court, (B) his domicile in the territorial jurisdiction of the court, or (C) his consent to the jurisdiction of the court.

* * * *

(e) Limitations.--(1) The total amount of the disposable retired pay of a member payable under all court orders pursuant to subsection (c) may not exceed 50 percent of such disposable retired pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse, the disposable retired pay of the member shall be used to satisfy (subject to the limitations of paragraph (1)) such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1)) out of that amount of disposable retired pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse of the same member, the Secretary concerned shall--

(i) pay to that spouse from the member's disposable retired pay the least amount directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired pay which remains available for payment of such court orders based on when such court orders were

effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired pay that is equal to the lesser of--

(I) the difference between the largest amount required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired pay (less any amount paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C. 659) and any amount paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus--

(I) the amount of disposable retired pay paid under clause (i); and

(II) the amount of disposable retired pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (a) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be

valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the same member, satisfaction of such court orders and legal process from the retired pay of the member shall be on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to a member may not exceed 65 percent of the amount of the retired pay payable to such member that is considered under section 462 of the Social Security Act (42 U.S.C. 662) to be remuneration for employment that is payable by the United States.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount which exceeds the amount of disposable retired pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an

amount that exceeds the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4), shall not be considered to be irregular on its face solely for that reason. However, such order shall be considered to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the maximum amount of disposable retired pay permitted under paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

{Added Pub.L. 97-252, Title X, § 1002(a), Sept. 8, 1982, 96 Stat. 730, and amended Pub.L. 98-525, Title VI, § 643(a) to (d), Oct. 19, 1984, 98 Stat. 2547; Pub.L. 99-661, Div. A, Title VI, § 644(a), Nov. 14, 1986, 100 Stat. 3887; Pub.L. 100-26, §§ 3(3), 7(h)(1), Apr. 21, 1987, 101 Stat. 273, 282; Pub.L. 101-189, Div. A, Title VI, § 653(a)(5), Title XVI, § 1622(e)(6), Nov. 29, 1989, 103 Stat. 1462, 1605; Pub.L. 101-510, Div. A, Title V, § 555(a) to (d), (f), (g), Nov. 5, 1990, 104 Stat. 1569, 1570; Pub.L. 102-190, Div. A, Title X, § 1061(a)(7), Dec. 5, 1991, 105 Stat. 1472; Pub.L. 102-484, Div. A, Title VI, §

653(a), Oct. 23, 1992, 106 Stat. 2426; Pub.L. 103-160, Div. A, Title V, § 555(a), (b), Title XI, § 1182(a)(2), Nov. 30, 1993, 107 Stat. 1666, 1771; Pub.L. 104-106, Div. A, Title XV, § 1501(c)(16), Feb. 10, 1996, 110 Stat. 499; Pub.L. 104-193, Title III, §§ 362(c), 363(c)(1) to (3), Aug. 22, 1996, 110 Stat. 2246, 2249; Pub.L. 104-201, Div. A, Title VI, § 636, Sept. 23, 1996, 110 Stat. 2579; Pub.L. 105-85, Div. A, Title X, § 1073(a)(24), (25), Nov. 18, 1997, 111 Stat. 1901; Pub.L. 107-107, Div. A, Title X, § 1048(c)(9), Dec. 28, 2001, 115 Stat. 1226.}

UNITED STATES CODE ANNOTATED
TITLE 38. VETERANS' BENEFITS
PART IV--GENERAL ADMINISTRATIVE PROVISIONS
CHAPTER 53--SPECIAL PROVISIONS RELATING TO BENEFITS

§ 5301. Nonassignability and exempt status of benefits.

(a) (1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. The preceding sentence shall not apply to claims of the United States arising under such laws nor shall the exemption therein contained as to taxation extend to any property purchased in part or wholly out of such payments. The provisions of this section shall not be construed to prohibit the assignment of insurance otherwise authorized under chapter 19 of this title, or of servicemen's indemnity.

(2) For the purposes of this subsection, in any case where a payee of an educational assistance allowance has designated the address of an attorney-in-fact as the payee's address for the purpose of receiving a benefit check and has also executed a power of attorney giving the attorney-in-fact authority to negotiate such benefit check, such action shall be deemed to be an assignment and is prohibited.

(3) (A) This paragraph is intended to clarify that, in any case

where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

(C) Any agreement or arrangement for collateral for security for an agreement that is prohibited under subparagraph (A) is also prohibited and is void from its inception.

(b) This section shall prohibit the collection by setoff or otherwise out of any benefits payable pursuant to any law administered by the Secretary and relating to veterans, their estates, or their dependents, of any claim of the United States or any agency thereof against (1) any person other than the indebted beneficiary or the beneficiary's estate; or (2) any beneficiary or the beneficiary's estate except amounts due the United States by such beneficiary or the beneficiary's estate by reason of overpayments or illegal payments made under such laws to such beneficiary or the beneficiary's estate or to the

beneficiary's dependents as such. If the benefits referred to in the preceding sentence are insurance payable by reason of yearly renewable term insurance, United States Government life insurance, or National Service Life Insurance issued by the United States, the exemption provided in this section shall not apply to indebtedness existing against the particular insurance contract upon the maturity of which the claim is based, whether such indebtedness is in the form of liens to secure unpaid premiums or loans, or interest on such premiums or loans, or indebtedness arising from overpayments of dividends, refunds, loans, or other insurance benefits.

(c)(1) Notwithstanding any other provision of this section, the Secretary may, after receiving a request under paragraph (2) of this subsection relating to a veteran, collect by offset of any compensation or pension payable to the veteran under laws administered by the Secretary the uncollected portion of the amount of any indebtedness associated with the veteran's participation in a plan prescribed in chapter 73 of title 10.

(2) If the Secretary concerned (as defined in section 101(5) of title 37) has tried under section 3711(a) of title 31 to collect an amount described in paragraph (1) of this subsection in the case of any veteran, has been unable to collect such amount, and has determined that the uncollected portion of such amount is not collectible from amounts payable by that Secretary to the veteran or that the veteran is not receiving any payment from that Secretary, that Secretary may request the Secretary to make collections in the case of such veteran as authorized in paragraph (1) of this subsection.

(3)(A) A collection authorized by paragraph (1) of this subsection shall be conducted in accordance with the procedures prescribed in section 3716 of title 31 for administrative offset

collections made after attempts to collect claims under section 3711(a) of such title.

(B) For the purposes of subparagraph (A) of this paragraph, as used in the second sentence of section 3716(a) of title 31--

(i) the term "records of the agency" shall be considered to refer to the records of the department of the Secretary concerned; and

(ii) the term "agency" in clauses (3) and (4) shall be considered to refer to such department.

(4) Funds collected under this subsection shall be credited to the Department of Defense Military Retirement Fund under chapter 74 of title 10 or to the Retired Pay Account of the Coast Guard, as appropriate.

(d) Notwithstanding subsection (a) of this section, payments of benefits under laws administered by the Secretary shall not be exempt from levy under subchapter D of chapter 64 of the Internal Revenue Code of 1986 (26 U.S.C. 6331 et seq.).

(e) In the case of a person who--

(1) has been determined to be eligible to receive pension or compensation under laws administered by the Secretary but for the receipt by such person of pay pursuant to any provision of law providing retired or retirement pay to members or former members of the Armed Forces or commissioned officers of the National Oceanic and Atmospheric Administration or of the Public Health Service; and

(2) files a waiver of such pay in accordance with section 5305

of this title in the amount of such pension or compensation before the end of the one-year period beginning on the date such person is notified by the Secretary of such person's eligibility for such pension or compensation, the retired or retirement pay of such person shall be exempt from taxation, as provided in subsection (a) of this section, in an amount equal to the amount of pension or compensation which would have been paid to such person but for the receipt by such person of such pay.

{Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1229, § 3101; Pub.L. 94-502, Title VII, § 701, Oct. 15, 1976, 90 Stat. 2405; Pub.L. 95-479, Title III, § 301, Oct. 18, 1978, 92 Stat. 1564; Pub.L. 97-295, § 4(74), Oct. 12, 1982, 96 Stat. 1310; Pub.L. 99-576, Title V, § 504, Title VII, § 701(68), Oct. 28, 1986, 100 Stat. 3286, 3296; renumbered § 5301 and amended Pub.L. 102- 40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, 4(a)(1), (2)(A)(vii), (b)(1), (2)(E), (4)(C), Aug. 6, 1991, 105 Stat. 403- 405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub.L. 101-189, Div. A, Title XIV, § 1404(b)(2), Nov. 29, 1989, 103 Stat. 1586; Pub.L. 102-25, Title VII, § 705(c)(2), Apr. 6, 1991, 105 Stat. 120; renumbered and amended Pub.L. 102-40, Title IV, § 402(b)(1), (d)(1), May 7, 1991, 105 Stat. 238, 239; Pub.L. 102-54, § 14(d)(2), June 13, 1991, 105 Stat. 285; Pub.L. 102-83, § 4(a)(1), (2)(A)(vii), (b)(1), (4)(C), Aug. 6, 1991, 105 Stat. 403-405; Pub.L. 102-86, Title V, § 505(a), Aug. 14, 1991, 102 Stat. 426; Pub. L. No. 108-183, § 702, Dec. 16, 2003.}